

## 2009 DRAFTING REQUEST

### Bill

Received: **04/28/2009**

Received By: **rryan**

Wanted: **As time permits**

Identical to LRB:

For: **Sandy Pasch (608) 266-7671**

By/Representing: **Fred Ludwig**

This file may be shown to any legislator: **NO**

Drafter: **rryan**

May Contact:

Addl. Drafters:

Subject: **Criminal Law - procedure**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Pasch@legis.wisconsin.gov**

Carbon copy (CC:) to:

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#### Pre Topic:

No specific pre topic given

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#### Topic:

Search warrants for electronic communications

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#### Instructions:

See attached

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#### Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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/P1	rryan 07/14/2009	csicilia 07/15/2009	mduchek 07/16/2009	_____	sbasford 07/16/2009		
/P2	rryan 11/17/2009	csicilia 11/23/2009	mduchek 11/23/2009	_____	mbarman 11/23/2009		
/1	rryan 01/11/2010	csicilia 01/11/2010	rschluet 01/11/2010	_____	mbarman 01/11/2010	cduerst 02/04/2010	

FE Sent For: **NONE**

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4/11/10  
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**Topic:**

Search warrants for electronic communications

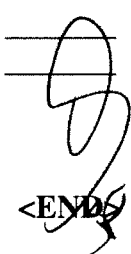
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**Instructions:**

See attached

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**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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/P1	rryan 07/14/2009	csicilia 07/15/2009	mduchek 07/16/2009		sbasford 07/16/2009		

FE Sent For:

*1/2 11/20/09*

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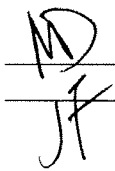
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**Instructions:**

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FE Sent For:							
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**Ryan, Robin**

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**From:** Hurley, Peggy  
**Sent:** Friday, April 24, 2009 3:27 PM  
**To:** Hanaman, Cathlene; Ryan, Robin  
**Subject:** FW: re: Electronic Search Warrants  
**Attachments:** Electronic Communication Search Warrant.doc; 2008-626.18[1].pdf

Anyone eager to take this?

---

**From:** Ludwig, Frederic  
**Sent:** Friday, April 24, 2009 3:21 PM  
**To:** Hurley, Peggy  
**Subject:** re: Electronic Search Warrants

Hi Peggy,

Rep. Pasch would like to get a draft formulated relating to search warrants for electronic communications. Attached is a "one-pager" that outlines the proposal along with changes made to Minnesota statutes that would be a good template to use. I don't know if you are the correct attorney to contact regarding this issue, but you seem to be a good place to start at least. Let me know if you have any questions regarding the draft or if I should contact someone else!

Thanks,  
Fred

--

Fred Ludwig  
**Office of Representative Sandy Pasch**  
608.266.7671 (Office)  
888.534.0022 (Toll-free)  
608.282.3622 (Fax)

04/28/2009





Department of Administration  
Intergovernmental Relations Division

Tom Barrett  
Mayor

Sharon Robinson  
Director of Administration

Paul Vornholt  
Director of Intergovernmental Relations

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## Proposal to amend state search warrant statute regarding electronic communications

As the role of the Internet has expanded for businesses and personal use, so has the spread of Internet-based crime. These crimes range from bank fraud to child enticement.

Wis. Stat. s. 968.12 (4) relating to search warrants states that "A search warrant may authorize a search to be conducted anywhere in the state and may be executed pursuant to its terms anywhere in the state." In addition, former Milwaukee County Circuit Court Chief Judge Kitty Brennan issued a 2007 ruling that required Milwaukee County Circuit Court Judges adhere to the state statute, and that they could not issue warrants for corporations that operate outside of the state of Wisconsin.

Because of the restrictions in the state statute, members of the Milwaukee Police Department's High Technology Unit are facing roadblocks in their investigations involving electronic communication. Internet-based crimes may be committed either between two Wisconsin residents, or by a perpetrator from out of state. The means of communication, i.e. a chat room, in which a crime is allegedly committed, can also be hosted by a corporation that is based outside of Wisconsin.

Detectives from MPD have to rely upon law enforcement agencies in other states to execute a search warrant for companies based outside of Wisconsin. Due to the nature of Internet-based crimes, timing is a critical factor in many of these investigations, and waiting for another law enforcement agency can be quite cumbersome and detrimental to the process.

The one option that law enforcement currently can use is requesting a subpoena by a Wisconsin judge to an out of state company to produce information. A subpoena is not comparable to a search warrant, however, because a search warrant would enable law enforcement to come across new information and further conduct their search based upon the new information. A subpoena is limited in scope, and only can produce information that has been requested.

The Electronic Communication Privacy Act in Chapter 121, U.S. Code, Title 18, sections 2701 through 2711 authorizes state judges to issue search warrants to companies who operate in other states regarding electronic communications. Many states, such as Minnesota, Massachusetts and Florida have already adopted laws reflecting this Act that allow issuing search warrants relating to electronic communications and remote computing services. These states listed above have also limited the scope of their law to focus solely on corporations that are providing electronic communication services to the general public.

**Proposal:** Amend Wis. Stat. s. 968.12 to adopt U.S. Code Title 18 to allow the issuance of search warrants to out-of-state corporations regarding Internet-based crimes. This will provide state and local law enforcement agencies with the appropriate tools to investigate Internet-based crimes.

For more information, please contact:

Steve Kwaterski, Senior Legislative Research Analyst  
(414) 286-3336 or [steve.kwaterski@milwaukee.gov](mailto:steve.kwaterski@milwaukee.gov)

*Milwaukee Rule  
4.18 - under review*

**626.18 SEARCH WARRANTS RELATING TO ELECTRONIC COMMUNICATION SERVICES AND REMOTE COMPUTING SERVICES.**

Subdivision 1. **Definitions.** The definitions in this subdivision apply to this section.

(a) The terms "electronic communication services" and "remote computing services" shall be construed in accordance with United States Code, title 18, sections 2701 to 2711, as amended through March 1, 2001. This section does not apply to corporations that do not provide those services to the general public.

(b) An "adverse result" occurs when notification of the existence of a search warrant results in:

- (1) danger to the life or physical safety of an individual;
- (2) a flight from prosecution;
- (3) the destruction of or tampering with evidence;
- (4) the intimidation of potential witnesses; or
- (5) serious jeopardy to an investigation or undue delay of a trial.

(c) "Applicant" means a peace officer as defined in section 626.05, to whom a search warrant is issued pursuant to this chapter.

(d) "Minnesota corporation" refers to any corporation or other entity that is subject to section 5.25, excluding foreign corporations.

(e) A "foreign corporation" is considered to be doing business in Minnesota if it makes a contract or engages in a terms of service agreement with a resident of Minnesota to be performed in whole or in part by either party in Minnesota. The making of the contract or terms of service agreement is considered to be the agreement of the foreign corporation that any administrative subpoena or search warrant properly served on it has the same legal force and effect as if served personally on it within the state of Minnesota.

(f) "Properly served" means that a search warrant has been delivered by hand, or in a manner reasonably allowing for proof of delivery if delivered by United States mail, overnight delivery service, or facsimile to a person or entity listed in section 5.25 or covered by this statute.

Subd. 2. **Application.** (a) The following provisions shall apply to any search warrant issued under this chapter allowing a search for records that are in the actual or constructive possession of a foreign corporation that provides electronic communication services or remote computing services to the general public, where those records would reveal the identity of the customers using those services; data stored by, or on behalf of, the customer; the customer's usage of those

services; the recipient or destination of communications sent to or from those customers; or the content of those communications.

(b) When properly served with a search warrant issued by the Minnesota court, a foreign corporation subject to this section shall provide to the applicant all records sought pursuant to that warrant within eight business days of receipt, including those records maintained or located outside this state.

(c) Where the applicant makes a showing and the judge finds that failure to produce records within less than eight business days would cause an adverse result, the warrant may require production of records within less than eight business days. A court may reasonably extend the time required for production of the records upon finding that the foreign corporation has shown good cause for that extension and that an extension of time would not cause an adverse result.

(d) A foreign corporation seeking to quash the warrant must seek relief from the court that issued the warrant within the time required for production of records under this section. The issuing court shall hear and decide that motion no later than eight court days after the motion is filed.

(e) The foreign corporation shall verify the authenticity of records that it produces by providing a written affidavit or statement to that effect.

Subd. 3. **Warrant of another state.** A Minnesota corporation that provides electronic communication services or remote computing services to the general public, when served with a warrant issued by another state to produce records that would reveal the identity of the customers using those services; data stored by, or on behalf of, the customer; the customer's usage of those services; the recipient or destination of communications sent to or from those customers; or the content of those communications, shall produce those records as if that warrant had been issued by a Minnesota court.

Subd. 4. **Immunity.** No cause of action shall lie against any foreign or Minnesota corporation subject to this section, its officers, employees, agents, or other specified persons for providing records, information, facilities, or assistance in accordance with the terms of a warrant issued pursuant to this chapter.

**History:** 2001 c 197 s 6

Select Year: 2008 ▼ Go

## The 2008 Florida Statutes

[Title VII](#)  
EVIDENCE

[Chapter 92](#)  
WITNESSES, RECORDS, AND DOCUMENTS

[View Entire Chapter](#)

### **92.605 Production of certain records by Florida businesses and out-of-state corporations.--**

(1) For the purposes of this section, the term:

(a) "Adverse result" includes one of the following consequences to notification of the existence of a court order, a subpoena, or a search warrant:

1. Danger to the life or physical safety of an individual.
2. A flight from prosecution.
3. The destruction of or tampering with evidence.
4. The intimidation of potential witnesses.
5. Serious jeopardy to an investigation or undue delay of a trial.

(b) "Applicant" means a law enforcement officer who is seeking a court order or subpoena under s. [16.56](#), s. [27.04](#), s. [905.185](#), or s. [914.04](#) or who is issued a search warrant under s. [933.01](#), or anyone who is authorized to issue a subpoena under the Florida Rules of Criminal Procedure.

(c) "Business" means any business, institution, association, profession, occupation, or calling of any kind, whether or not conducted for profit.

(d) "Electronic communication services" and "remote computing services" have the same meaning as provided in the Electronic Communications Privacy Act in chapter 121 (commencing with s. 2701) of part I of Title 18 of the United States Code Annotated. This section does not apply to corporations that do not provide those services to the public.

(e) "Out-of-state corporation" means any corporation that is qualified to do business in this state under s. [607.1501](#).

(f) "Out-of-state record of regularly conducted business activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in another state or country.

(g) "Out-of-state certification" means a written declaration made and signed in another state or country by the custodian of an out-of-state record of regularly conducted business activity or another qualified person that, if falsely made, would subject the declarant to criminal penalty under the laws of another state or country.

(h) "Properly served" means delivery by hand or in a manner reasonably allowing for proof of delivery if delivered by United States mail, overnight delivery service, or facsimile to a person or entity properly registered to do business in any state. In order for an out-of-state corporation to be properly served, the service described in this paragraph must be effected on the corporation's registered agent.

(2) The following provisions apply to any subpoena, court order, or search warrant issued in compliance with the Electronic Communications Privacy Act in chapter 121 (commencing with s. 2701) of part I of Title 18 of the United States Code and that is subject to this chapter, which allows a search for records that are in the actual or constructive possession of an out-of-state corporation that provides electronic communication services or remote computing services to the public, when those records would reveal the identity of the customers using those services; data stored by, or on behalf of, the customers; the customers' usage of those services; or the recipients or destinations of communications sent to or from those customers.

(a) Any subpoena, court order, or warrant issued under this subsection must contain the following language in bold type on the first page of the document: "This (subpoena, order, warrant) is issued pursuant to Florida Statute s. 92.605. A response is due within 20 business days of receipt of this (subpoena, order, warrant) unless a longer time period is stated herein."

(b) When properly served with a subpoena, court order, or search warrant issued by a Florida court or other applicant, an out-of-state corporation subject to this section shall provide to the applicant all records sought pursuant to such subpoena, court order, or warrant within 20 business days after receipt, or the date indicated within the subpoena, if later, including those records maintained or located outside the State of Florida. If the records cannot be produced within the 20-day time period, the out-of-state corporation shall notify the applicant within the 20-day time period and agree to produce the documents at the earliest possible time. The applicant shall pay the out-of-state corporation the reasonable expenses associated with compliance.

(c) When the applicant makes a showing and the court finds that failure to produce records within 20 business days would cause an adverse result, the subpoena, court order, or warrant may require production of records within less than 20 business days. A court may reasonably extend the time required for production of the records upon finding that the out-of-state corporation needs the extension and that an extension of time would not cause an adverse result.

(d) An out-of-state corporation seeking to quash or object to the subpoena, court order, or warrant must seek relief from the court issuing such subpoena, court order, or warrant within the time required for production of records under this section. The issuing court shall hear and decide that motion within 5 court days after the motion is filed.

(e) Upon written request from the applicant or if ordered by the court, the out-of-state corporation shall verify the authenticity of records that it produces by providing an affidavit that complies with the requirements set forth in this section. Records produced in compliance with this section are admissible in evidence as set forth in

subsection (5).

(3) A Florida business that provides electronic communication services or remote computing services to the public, when served with a subpoena, court order, or warrant issued by another state to produce records that would reveal the identity of the customers using those services; data stored by, or on behalf of, the customers; the customers' usage of those services; or the recipients or destinations of communications sent to or from those customers shall produce those records as if that subpoena, court order, or warrant had been issued by a Florida court.

(4) A cause of action does not arise against any out-of-state corporation or Florida business subject to this section, or its officers, employees, agents, or other specified persons, for providing records, information, facilities, or assistance in accordance with the terms of a subpoena, court order, or warrant subject to this section.

(5) In a criminal proceeding in a court of this state, an out-of-state record of regularly conducted business activity, or a copy of such record, shall not be excluded as hearsay evidence by s. 90.802, if an out-of-state certification attests that:

(a) Such record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.

(b) Such record was kept in the course of a regularly conducted business activity.

(c) The business activity made such a record as a regular practice.

(d) If such record is not the original, it is a duplicate of the original, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

(6) An out-of-state certification under this section shall authenticate such record or duplicate.

(7) No evidence in such records in the form of opinion or diagnosis is admissible under subsection (5) unless such opinion or diagnosis would be admissible under ss. 90.701-90.705 if the person whose opinion is recorded were to testify to the opinion directly.

(8) As soon after the arraignment as practicable, or 60 days prior to trial, a party intending to offer in evidence under this section an out-of-state record of regularly conducted business activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

(9) In any criminal case, the content of any electronic communication may be obtained under this section only by court order or by the issuance of a search warrant, unless otherwise provided under the Electronic Communications Privacy Act or other provision of law.

**History.**---s. 3, ch. 2003-71.

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## Chapter 205 of the Acts of 2008

### AN ACT FURTHER PROTECTING CHILDREN

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:*

**SECTION 1.** Chapter 265 of the General Laws is hereby amended by striking out section 13B, as appearing in the 2006 Official Edition, and inserting in place thereof the following 3 sections:-

Section 13B. Whoever commits an indecent assault and battery on a child under the age of 14 shall be punished by imprisonment in the state prison for not more than 10 years, or by imprisonment in the house of correction for not more than 2½ years. A prosecution commenced under this section shall neither be continued without a finding nor placed on file.

In a prosecution under this section, a child under the age of 14 years shall be deemed incapable of consenting to any conduct of the defendant for which such defendant is being prosecuted.

Section 13B½. Whoever commits an indecent assault and battery on a child under the age of 14 and:

(a) the indecent assault and battery was committed during the commission or attempted commission of the following offenses:- (1) armed burglary as set forth in section 14 of chapter 266; (2) unarmed burglary as set forth in section 15 of said chapter 266; (3) breaking and entering as set forth in section 16 of said chapter 266; (4) entering without breaking as set forth in section 17 of said chapter 266; (5) breaking and entering into a dwelling house as set forth in section 18 of said chapter 266; (6) kidnapping as set forth in section 26 of chapter 265; (7) armed robbery as set forth in section 17 of said chapter 265; (8) unarmed robbery as set forth in section 19 of said chapter 265; (9) assault and battery with a dangerous weapon or assault with a dangerous weapon, as set forth in sections 15A and 15B of said chapter 265; (10) home invasion as set forth in section 18C of said chapter 265; or (11) posing or exhibiting child in state of nudity or sexual conduct as set forth in section 29A of chapter 272; or

(b) at the time of commission of said indecent assault and battery, the defendant was a mandated reporter as is defined in section 21 of chapter 119, shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 10 years. The sentence imposed on such person shall not be reduced to less than 10 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 10 years of such sentence. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file.

In a prosecution under this section, a child under the age of 14 years shall be deemed incapable of consenting to any conduct of the defendant for which such defendant is being prosecuted.

Section 13B¾. Whoever commits an indecent assault and battery on a child under the age of 14 and has been previously convicted of or adjudicated delinquent or as a youthful offender for: indecent assault and battery on a child under 14 as set forth in section 13B; aggravated indecent assault and battery on a child under 14 as set forth in section 13B½; indecent assault and battery on a person 14 or older as set forth in section 13H; assault of a child with intent to commit rape as set forth in section 24B; rape of a child with force as set forth in section 22A; aggravated rape of a child with force as set forth in section 22B; rape and abuse of a child as set forth in section 23; aggravated rape and abuse of a child as set forth in section 23A; rape as set forth in section 22 or; a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority, shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 15



years. The sentence imposed on such person shall not be reduced to less than 15 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 15 years of such sentence. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file.

In any prosecution commenced pursuant to this section, introduction into evidence of a prior adjudication or conviction or a prior finding of sufficient facts by either certified attested copies of original court papers, or certified attested copies of the defendant's biographical and informational data from records of the department of probation, any jail or house of correction or the department of correction shall be prima facie evidence that the defendant before the court had been convicted previously by a court of the commonwealth or any other jurisdiction. Such documentation shall be self-authenticating and admissible, after the commonwealth has established the defendant's guilt on the primary offense, as evidence in any court of the commonwealth to prove the defendant's commission of any prior conviction described therein. The commonwealth shall not be required to introduce any additional corroborating evidence or live witness testimony to establish the validity of such prior conviction.

**SECTION 2.** Said chapter 265 is hereby further amended by striking out sections 22A and 23, as so appearing, and inserting in place thereof the following 6 sections:-

Section 22A. Whoever has sexual intercourse or unnatural sexual intercourse with a child under 16, and compels such child to submit by force and against his will or compels such child to submit by threat of bodily injury, shall be punished by imprisonment in the state prison for life or for any term of years. A prosecution commenced under this section shall neither be continued without a finding nor placed on file.

Section 22B. Whoever has sexual intercourse or unnatural sexual intercourse with a child under 16, and compels such child to submit by force and against his will or compels such child to submit by threat of bodily injury and:

- (a) the sexual intercourse or unnatural sexual intercourse is committed during the commission or attempted commission of any of the following offenses: (1) armed burglary as set forth in section 14 of chapter 266; (2) unarmed burglary as set forth in section 15 of said chapter 266; (3) breaking and entering as set forth in section 16 of said chapter 266; (4) entering without breaking as set forth in section 17 of said chapter 266; (5) breaking and entering into a dwelling house as set forth in section 18 of said chapter 266; (6) kidnapping as set forth in section 26 of chapter 265; (7) armed robbery as set forth in section 17 of said chapter 265; (8) unarmed robbery as set forth in section 19 of said chapter 265; (9) assault and battery with a dangerous weapon or assault with a dangerous weapon as set forth in sections 15A and 15B of said chapter 265; (10) home invasion as set forth in section 18C of said chapter 265; or (11) posing or exhibiting child in state of nudity or sexual conduct as set forth in section 29A of chapter 272;
- (b) the sexual intercourse or unnatural sexual intercourse results in, or is committed by means of an act or acts resulting in, substantial bodily injury as defined in section 13J;
- (c) the sexual intercourse or unnatural sexual intercourse is committed while the victim is tied, bound or gagged;
- (d) the sexual intercourse or unnatural sexual intercourse is committed after the defendant administered, or caused to be administered, alcohol or a controlled substance by injection, inhalation, ingestion, or any other means to the victim without the victim's consent;
- (e) the sexual intercourse or unnatural sexual intercourse is committed by a joint enterprise; or
- (f) the sexual intercourse or unnatural sexual intercourse was committed in a manner in which the victim could contract a sexually transmitted disease or infection of which the defendant knew or should have known he was a carrier, shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 15 years. The sentence imposed on such person shall not be reduced to less than 15 years, or suspended, nor

shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 15 years of such sentence. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file.

Section 22C. Whoever has sexual intercourse or unnatural sexual intercourse with a child under 16, and compels such child to submit by force and against his will or compels such child to submit by threat of bodily injury, and has been previously convicted of or adjudicated delinquent or as a youthful offender for: indecent assault and battery on a child under 14 as set forth in section 13B; aggravated indecent assault and battery on a child under 14 as set forth in section 13B½; indecent assault and battery on a person 14 or older as set forth in section 13H; assault of a child with intent to commit rape as set forth in section 24B; rape of a child with force as set forth in section 22A; aggravated rape of a child with force as set forth in section 22B; rape and abuse of a child as set forth in section 23; aggravated rape and abuse of a child as set forth in section 23A; rape as set forth in section 22; or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority, shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 20 years. The sentence imposed on such person shall not be reduced to less than 20 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release or furlough or receive any deduction from his sentence for good conduct until he shall have served 20 years of such sentence. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file.

In any prosecution commenced pursuant to this section, introduction into evidence of a prior adjudication or conviction or a prior finding of sufficient facts by either certified attested copies of original court papers, or certified attested copies of the defendant's biographical and informational data from records of the department of probation, any jail or house of correction or the department of correction, shall be prima facie evidence that the defendant before the court has been convicted previously by a court of the commonwealth or any other jurisdiction. Such documentation shall be self-authenticating and admissible, after the commonwealth has established the defendant's guilt on the primary offense, as evidence in any court of the commonwealth to prove the defendant's commission of any prior conviction described therein. The commonwealth shall not be required to introduce any additional corroborating evidence or live witness testimony to establish the validity of such prior conviction.

Section 23. Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under 16 years of age, shall be punished by imprisonment in the state prison for life or for any term of years or, except as otherwise provided, for any term in a jail or house of correction. A prosecution commenced under this section shall neither be continued without a finding nor placed on file.

Section 23A. Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under 16 years of age and:

- (a) there exists more than a 5 year age difference between the defendant and the victim and the victim is under 12 years of age;
- (b) there exists more than a 10 year age difference between the defendant and the victim where the victim is between the age of 12 and 16 years of age; or
- (c) at the time of such intercourse, was a mandated reporter as defined in section 21 of chapter 119, shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 10 years. The sentence imposed on such person shall not be reduced to less than 10 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 10 years of such sentence. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file.

Section 23B. Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under 16 years of age and has been previously convicted of or adjudicated delinquent or as a youthful offender

for: indecent assault and battery on a child under 14 under section 13B; aggravated indecent assault and battery on a child under 14 under section 13B½; indecent assault and battery on a person 14 or older under section 13H; assault of a child with intent to commit rape under section 24B; rape of a child with force under section 22A; aggravated rape of a child with force under section 22B; rape and abuse of a child under section 23; aggravated rape and abuse of a child under section 23A; rape under section 22; or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority, shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 15 years. The sentence imposed on such person shall not be reduced to less than 15 years, or suspended, nor shall any person convicted under this section be eligible for probation, parole, work release, or furlough or receive any deduction from his sentence for good conduct until he shall have served 15 years of such sentence. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file.

In any prosecution commenced pursuant to this section, introduction into evidence of a prior adjudication or conviction or a prior finding of sufficient facts by either certified attested copies of original court papers, or certified attested copies of the defendant's biographical and informational data from records of the department of probation, any jail or house of correction or the department of correction, shall be prima facie evidence that the defendant before the court has been convicted previously by a court of the commonwealth or any other jurisdiction. Such documentation shall be self-authenticating and admissible, after the commonwealth has established the defendant's guilt on the primary offense, as evidence in any court of the commonwealth to prove the defendant's commission of any prior conviction described therein. The commonwealth shall not be required to introduce any additional corroborating evidence or live witness testimony to establish the validity of such prior conviction.

**SECTION 3.** Chapter 271 of the General Laws is hereby amended by striking out section 17B, as so appearing, and inserting in place thereof the following section:-

Section 17B. Except as otherwise prohibited under section 2703 of Title 18 of the United States Code, whenever the attorney general or a district attorney has reasonable grounds to believe that records in the possession of: (i) a common carrier subject to the jurisdiction of the department of telecommunications and cable, as provided in paragraph (d) of section 12 of chapter 159; or (ii) a provider of electronic communication service as defined in subparagraph (15) of section 2510 of Title 18 of the United States Code; or (iii) a provider of remote computing service as defined in section 2711 of Title 18 of the United States Code, are relevant and material to an ongoing criminal investigation, the attorney general or district attorney may issue an administrative subpoena demanding all such records in the possession of such common carrier or service, and such records shall be delivered to the attorney general or district attorney within 14 days of receipt of the subpoena. No such common carrier or service, or employee thereof, shall be civilly or criminally responsible for furnishing any records or information in compliance with such demand. Nothing in this section shall limit the right of the attorney general or a district attorney to otherwise obtain records from such a common carrier or service pursuant to a search warrant, a court order or a grand jury or trial subpoena.

No subpoena issued pursuant to this section shall demand records that disclose the content of electronic communications or subscriber account records disclosing internet locations which have been accessed including, but not limited to, websites, chat channels and newsgroups, but excluding servers used to initially access the internet. No recipient of a subpoena issued pursuant to this section shall provide any such content or records accessed, in response to such subpoena.

**SECTION 4.** Chapter 276 of the General Laws is hereby amended by inserting after section 1A, the following section:-

Section 1B. (a) As used in this section, the following words shall have the following meanings:-

“Adverse result”, occurs when notification of the existence of a search warrant results in:-

- (1) danger to the life or physical safety of an individual;
- (2) a flight from prosecution;
- (3) the destruction of or tampering with evidence;
- (4) the intimidation of a potential witness or witnesses; or
- (5) serious jeopardy to an investigation or undue delay of a trial.

"Electronic communication services", shall be construed in accordance with sections 2701 to 2711 Title 18, of the United States Code. This definition shall not apply to corporations that do not provide electronic communication services to the general public.

"Foreign corporation", any corporation or other entity that makes a contract or engages in a terms of service agreement with a resident of the commonwealth to be performed in whole or in part by either party in the commonwealth. The making of the contract or terms of service agreement shall be considered to be the agreement of the foreign corporation that a search warrant or subpoena which has been properly served on it has the same legal force and effect as if served personally within the commonwealth.

"Massachusetts corporation", any corporation or other entity that is subject to chapter 155 or chapter 156B.

"Properly served", delivery of a search warrant or subpoena by hand, by United States mail, by commercial delivery service, by facsimile or by any other manner to any officer of a corporation or its general manager in the commonwealth, to any natural person designated by it as agent for the service of process, or if such corporation has designated a corporate agent, to any person named in the latest certificate filed pursuant to section 15.03 of chapter 156D.

"Remote computing services", shall be construed in accordance with sections 2701 to 2711, inclusive, of Title 18, of the United States Code. This definition shall not apply to corporations that do not provide those services to the general public.

"Subpoena", a grand jury or trial subpoena issued in the course of a criminal proceeding or an administrative subpoena issued pursuant to section 17B of chapter 271.

(b) A court or justice authorized to issue warrants in criminal cases may, upon complaint on oath that the complainant believes that any of the records hereinafter named are actually or constructively possessed by a foreign corporation that provides electronic communication services or remote computing services, if satisfied that probable cause has been established for such belief, issue a warrant identifying those records to be searched for and commanding the person seeking such warrant to properly serve the warrant upon the foreign corporation:-

- (1) those records which would reveal the identity of a customer using those services;
- (2) data stored by or on behalf of a customer;
- (3) records of a customer's usage of those services;
- (4) records of the source of communications sent to or the recipient or destination of communications sent from a customer; or
- (5) the content of those communications stored by an electronic communication or remote commuting service.

(c) The following provisions shall apply to any search warrant issued pursuant to this section and to any subpoena issued in the course of a criminal investigation or proceeding directed to a foreign corporation that provides electronic communication services or remote computing services:

- (1) when properly served with a search warrant issued by any court of the commonwealth or justice pursuant to this section or a subpoena, a foreign corporation subject to this section shall provide all records sought pursuant to that warrant or subpoena within 14 days of receipt, including those records maintained or located outside the commonwealth;
- (2) if the applicant makes a showing and the court or justice finds that failure to produce records within less than 14 days would cause an adverse result, a warrant may require production of records within less than 14 days;
- (3) a court or justice may reasonably extend the time required for production of the records upon finding that

the foreign corporation has shown good cause for that extension and that an extension of time would not cause an adverse result;

(4) a foreign corporation seeking to quash a warrant or subpoena served on it pursuant to this section shall seek relief from the court that issued the warrant or the court which has jurisdiction over the subpoena within the time required for production of records pursuant to this section. The court shall hear and decide such motion not later than 14 days after the motion is filed;

(5) in the case of an administrative subpoena issued by the attorney general, the superior court of Suffolk county shall have jurisdiction and in the case of an administrative subpoena issued by a district attorney, the superior court in any county in which the district attorney maintains an office shall have jurisdiction; and

(6) the foreign corporation shall verify the authenticity of records that it produces by providing an affidavit from the person in custody of those records certifying that they are true and complete.

(d) A Massachusetts corporation that provides electronic communication services or remote computing services, when served with a warrant or subpoena issued by another state to produce records that would reveal the identity of the customers using those services, data stored by, or on behalf of the customer, the customer's usage of those services, the recipient or destination of communications sent to or from those customers, or the content of those communications, shall produce those records as if that warrant or subpoena had been issued under the law of the commonwealth.

(e) No cause of action shall lie against any foreign or Massachusetts corporation subject to this section, its officers, employees, agents or other persons for providing records, information, facilities or assistance in accordance with the terms of a warrant or subpoena issued pursuant to this section.

**SECTION 5.** Notwithstanding any general or special law to the contrary, the chief justice for administration and management of the trial court shall establish and implement an annual reporting system that shall provide information to the joint committee on the judiciary relative to the prosecution and disposition of cases which involve offenses established under this act. The reporting system shall be established not later than December 31, 2008, and the first annual report shall be filed with the clerk of the house and the clerk of the senate and the joint committee on the judiciary not later than December 31, 2009.

*Approved July 24, 2008*

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**Return to:**

[List of Laws passed in 2008 Session](#)

[General Court home page](#), or

[Commonwealth of Massachusetts home page](#).

6/26/09 - called Fred for  
citations to Mass. and Florida  
statutes.

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6/29 - call to Fred  
Discussed that federal law doesn't  
authorize search just provides for  
judge to order disclosure of  
information

Still want bill to look like  
Minnesota, Mass & Fla? - will  
get back to me

**Ryan, Robin**

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**From:** Ludwig, Frederic  
**Sent:** Tuesday, June 30, 2009 2:35 PM  
**To:** Ryan, Robin  
**Subject:** FW: U.S CODE title 18, section 2701 to 2711

Robin,

See below for some additional perspective on the issue. If you need any further clarification, please let me know!

Fred

--  
Fred Ludwig  
**Office of Representative Sandy Pasch**  
608.266.7671 (Office)  
888.534.0022 (Toll-free)  
608.282.3622 (Fax)

---

**From:** Kwaterski, Steve [mailto:skwate@milwaukee.gov]  
**Sent:** Tuesday, June 30, 2009 2:31 PM  
**To:** Ludwig, Frederic  
**Subject:** FW: U.S CODE title 18, section 2701 to 2711

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**From:** Morrison, Denmark  
**Sent:** Tuesday, June 30, 2009 2:17 PM  
**To:** Kwaterski, Steve  
**Subject:** FW: U.S CODE title 18, section 2701 to 2711

SGT. DENMARK MORRISON

OFFICE OF THE CHIEF  
OFFICE OF MANAGEMENT ANALYSIS AND PLANNING  
MILWAUKEE POLICE DEPARTMENT

414-935-7876  
[dmorri@milwaukee.gov](mailto:dmorri@milwaukee.gov)

---

**From:** Litwin, Hedda [mailto:HLitwin@NAAG.ORG]  
**Sent:** Fri 11/14/2008 4:16 PM  
**To:** Morrison, Denmark  
**Subject:** RE: U.S CODE title 18, section 2701 to 2711

Sergeant,

06/30/2009

In recognizing that Wisconsin probably has legal nuances only applicable to their jurisdiction, here are some of my thoughts:

Federal law allows state court judges to issue a 2703(d) order which allows national service and also allows the production of most records, excluding real time communications, voice mail and unopened e-mail. The question is whether Wisconsin state law will allow the use of these orders. Sometimes you can get records under the Electronics Communications Privacy Act (ECPA) without a statute granting this authority. For example, in California there were a series of rulings a while back that allowed state law enforcement to obtain records under the ECPA even though they had no statute granting them the authority. In short, it rested on expectation of privacy and suppression remedies. So even though they had no state statutory authority they were able to use state process to obtain records that were not barred by federal rules.

Soliciting a change in your search warrant statute to adopt the US Code is not your only solution. First, you could create your own long arm statute to allow for the production of records of businesses that are stored out of state. Second, you could create a legal fiction where the warrant is served on an agent within the state for the production of records stored outside of the state. This latter solution requires cooperation from the served entity and also raises some issues under the ECPA which requires that the warrant be served where the records are stored. For that reason, I think the long arm statute approach is preferable.

I hope this helps you address the issue.

Hedda

Hedda Litwin  
Cyber Crime Counsel  
National Association of Attorneys General  
2030 M Street, NW  
8th Floor  
Washington, DC 20036  
Phone (202) 326-6022  
Fax (202) 331-1427  
E-mail: [hlitwin@naag.org](mailto:hlitwin@naag.org)

---

**From:** Morrison, Denmark [<mailto:dmorri@milwaukee.gov>]  
**Sent:** Tuesday, November 11, 2008 11:29 AM  
**To:** Litwin, Hedda  
**Subject:** RE: U.S CODE title 18, section 2701 to 2711

Hello,

I am hoping I could receive your recommendation regarding electronic communication search warrants. Until recently members of our police department high technology unit were receiving search warrants for electronic based companies that operate outside the State of Wisconsin. However, Wisconsin have not adopted U. S Code title 18, section 2701 to 2711 within the search warrant statute, which limits the scope of any search to the boundaries of Wisconsin. However, judges were issuing warrants to search electronic data for companies that operate outside our state, because they understood that perpetrators frequently reside in another state and the domain that they used are also frequently based in another state. In 2007 a Milwaukee County Chief Judge gave a ruling that no Milwaukee County Judge can issue a warrant for any electronic based company that operates in another state. We are now encountering roadblocks when investigating electronic communication crimes, such as cyber crime. Through your knowledge and expertise, do you have any recommendation for our department? is soliciting a change in our search warrant statute to adopt title 18, section 2701 to 2711 the only solution? do you have a list of state that have adopted title 18, section 2701 to 2711? I would appreciate any assistance you may have. Thank you.

**SGT. DENMARK MORRISON**

**OFFICE OF THE CHIEF  
PLANNING AND RESEARCH  
MILWAUKEE POLICE DEPARTMENT**

06/30/2009



414-935-7876  
dmorri@milwaukee.gov



State of Wisconsin  
2009 - 2010 LEGISLATURE

LRB-27897

RLR:.....

Wanted through editing  
by noon Thurs.

cjs

**PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION**

RMR

D-N

SA /  
SA /  
x-ref /

Gen Cat

1 AN ACT ...; relating to: warrant to compel disclosure of contents of, or certain  
2 customer information relating to, wire or electronic communications.

*Analysis by the Legislative Reference Bureau*

This is a preliminary draft. An analysis will be provided in a later version.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

3 SECTION 1. 968.27 (intro.) of the statutes is amended to read:

4 **968.27 Definitions.** (intro.) In ss. 968.28 to ~~968.37~~ 968.375:

History: 1971 c. 40 s. 93; 1987 a. 399; 1991 a. 39; 1997 a. 218.

5 SECTION 2. 968.375 of the statutes is created to read:

6 **968.375 Warrant for disclosure of customer communications or**  
7 **records. (1)** In this section:

8 (a) "Remote computing service" means the provision to the public of computer  
9 storage or processing services by means of an electronic communications system.

e 17

(b) Notwithstanding s. 968.27 (19), "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, microwave or other like connection between the point of origin and the point of reception, including the use of the connection in any switching station, furnished or operated by any person engaged in providing or operating the facilities for the transmission of intrastate, interstate or foreign communications. "Wire communication" includes the electronic storage of any such aural transfer, but does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.

(2) Upon request by a law enforcement officer investigating a crime, and upon showing of probable cause under s. 968.12<sup>✓</sup>, a court in the county in which the criminal action may be tried may issue a warrant requiring a provider of electronic communication service or of remote computing service, regardless of whether the provider is located within or without this state, to disclose any of the following to the law enforcement officer:

(a) The content of a wire or electronic communication that is in electronic storage in an electronic communications system or held or maintained by a provider of remote computing service.

\*\*\*\*NOTE: 18 USC 2703 (b) includes additional conditions for communications held by a provider of remote computing services. I may need to add these conditions to this draft.

(b) <sup>Any of</sup> The following <sup>of</sup> ~~for~~ a subscriber to, or customer of, the electronic communication service or remote computing service:

1. Name.
2. Address.

1           3. Local and long distance telephone connection records, or records of session  
2 times and durations.

3           4. Length of service, including start date, and types of service utilized.

4           5. Telephone or instrument number or other subscriber number or identity,  
5 including any temporarily assigned network address.

6           6. Means and source of payment for the electronic communication service or  
7 remote computing service, including any credit card or bank account number. ✓✓✓

8           (3) Section 968.12 (2) and (3) (a), (b), (c), (d), and (e) applies to the basis and  
9 application for, and issuance of, a warrant under this section as it applies to the basis  
10 and application for, and issuance of, a search warrant under s. 968.12.

11           (4) A warrant issued under this section may be served upon a domestic or  
12 foreign corporation in the manner provided for serving a summons under 801.11 (5)  
13 or, if proof of delivery ~~may~~ reasonably be proved, by United State mail, overnight  
14 delivery service, or facsimile. CAN

15           (5) A warrant issued under this section shall be served not more than 5 days  
16 after the date of issuance. A warrant that is not executed with 5 days shall be void  
17 and shall be returned to the court that issued it.

\*\*\*\*NOTE: This 5-day limit for service is based on s. 968.15. Do you want a different  
time for serving warrants under this section.

18           (6) The person on whom a warrant under this section is served shall provide  
19 the law enforcement officer all records covered by the warrant within 8 days after  
20 service.

\*\*\*\*NOTE: The 8-day limit for production is based on the Minnesota statute. The  
Minnesota statute also provides for a shorter time if necessary to avoid "adverse results,"  
which is defined. Do you want to provide for a shorter time for production?

(7) A warrant under this section shall be issued with all practicable secrecy, and the complaint, affidavit, or testimony upon which it is based may not be filed with the clerk or made public in any way until the search warrant is executed.

\*\*\*\*NOTE: Subsection (7) is based on s. 968.21.

(8) Evidence disclosed under a warrant issued under this section shall not be suppressed because of technical irregularities not affecting the substantial rights of the defendant.

\*\*\*\*NOTE: Subsection (8) is based on s. 968.22.

**(END)**

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2789<sup>P1</sup>dn

RLR: /:.....

js

Representative Pasch:

1. This is a preliminary draft. Please review it and let me know if it satisfies your intent. I will likely need to make some refinements and additions upon further review. It would be helpful to me to be able to review this draft with the Department of Justice or with a district attorney.

2. I assume that you want a court to be able to require an out-of-state company to produce information, but that you do not want to authorize Wisconsin law enforcement officers to execute a search warrant for this information out of state. The draft therefore grants authority to issue a "warrant," not a "search warrant." Federal law (18 USC 2703) does refer specifically to a "search warrant," but presumably federal law enforcement officers have jurisdiction to execute a search warrant nationwide. The Minnesota, Florida, and Massachusetts statutes provide for issuing "search warrants," and direct that upon service of the search warrant the recipient of the warrant "shall provide" records identified in the record. I do not know whether these state laws provide for a state officer to perform a search out-of-state. ✓

3. 18 USC 2703 authorizes a variety of modes by which a court may compel a company to disclose information, including a search warrant, a court order, and an administrative subpoena. This draft authorizes only a warrant. ✓

4. 18 USC 2703 requires a showing of probable cause before a court court may compel disclosure of the content of a wire or electronic communication, and requires a lesser showing of proof before a court may compel disclosure of certain subscriber information, such as name, address, service times, and credit card and bank account information. This draft requires probable cause before a court may compel disclosure of either communication content or subscriber information. Do you want to require a lesser showing of proof for disclosure of subscriber information? ✓

5. 18 USC 2703 relies on definitions contained in the federal wiretap law (18 USC 2510). The definitions under the Wisconsin wiretap law (s. 968.27) are quite similar to the federal definitions for wiretap, but for some terms are not exactly the same. This draft uses the definitions under s. 968.27, except with respect to the definition of "wire communication." I did not use the definition under s. 968.27 (17) for "wire communication" because it refers to transfers made through facilities that are furnished or operated by a person engaged as a public utility. I assume you do not want ✓

to limit the meaning of wire communication to transmissions made through public utilities. As an alternative to creating a second definition of "wire communication," I could look into whether removing the reference to "public utility" in s. 968.27 (17) would be detrimental to application of the current wiretap law. ✓

Also, this draft uses the definition of "electronic communication" under s. 968.27 (4) even though some of the exceptions differ from the exception in the federal definition under 18 USC 2510 (12). ✓

6. The Minnesota statute (626.18) allows issuance of a warrant to an out-of-state corporation only if the corporation contracts or engages in a terms of service agreement with a resident of Minnesota to be performed in whole or in part in Minnesota. This draft does not contain a similar provisions. Presumably 18 USC 2703 provides sufficient authority to make a warrant issued in Wisconsin enforceable against an out-of-state corporation. I do not know whether a provision such as in the Minnesota statute would aid enforcement.

7. The Minnesota law includes a provision requiring Minnesota corporations to comply with warrants issued by courts in other states. Do you want to create a similar provision for Wisconsin corporations?

8. Do you want to address payment to a company for the cost of complying with a warrant?

Robin Ryan  
Legislative Attorney  
Phone: (608) 261-6927  
E-mail: robin.ryan@legis.wisconsin.gov

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-2789/P1dn  
RLR:cjs:rs

July 15, 2009

Representative Pasch:

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Robin Ryan  
Legislative Attorney  
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E-mail: robin.ryan@legis.wisconsin.gov